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Supreme Court, U.S.
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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in construing an agency regulation (48 C.F.R. § 33.207(c)(2)) so that it is inconsistent with the Contract Disputes Act and usurps a corporation's prerogative to designate who may speak for it.

2. Whether the court of appeals erred in deferring to the agency's interpretation of the statutory certification requirement because the agency lacked statutory authority to promulgate any regulation regarding certification of claims.

3. Whether the court of appeals erred in holding that certification of a claim is a prerequisite to the exercise of subject matter jurisdiction.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Grumman Aerospace Corporation respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the opinion and judgment of that court in *United States v. Grumman Aerospace Corporation.*

OPINIONS BELOW

The opinion of the court of appeals is reported at 927 F.2d 575 and is set forth in Appendix A. The opinion of the Armed Services Board of Contract Appeals is reported at 90-1 BCA (CCH) ¶ 22,417 (1989) and is set forth in Appendix B.

The original judgment of the court of appeals was entered on October 1, 1990, in a nonprecedential opinion reported at 918 F.2d 185 (table), and is set forth in Appendix C. Grumman Aerospace filed a timely petition for rehearing and suggestion for rehearing *en banc*. On January 11, 1991, the court initially denied the petition for rehearing, but on January 25, the court withdrew its denial of the petition and recalled the mandate. These orders are attached as Appendix D. On January 30, the court issued an opinion that was recalled later the same day and declared by a notice dated February 20, 1991, to be "of no effect." The notice is reproduced in Appendix E. On February 27, the court issued its published opinion granting the petition for rehearing, but adhering to the result set forth in its October 1, 1990, opinion.

JURISDICTION

This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This case concerns the meaning and effect of the claim certification requirement contained in the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1), which states in its entirety:

> A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate

> and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

Federal Acquisition Regulation (FAR) 33.207(c)(2), 48 C.F.R., purports to implement the statutory requirement. It provides:

> If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

STATEMENT OF THE CASE

This case presents important questions arising under the Contract Disputes Act of 1978—the statute that governs the adjudication of virtually all contract disputes between the federal government and the many thousands of individuals, partnerships and corporations that supply goods and services to the Government. Specifically at issue are (i) the meaning and effect of the requirement imposed by Congress in 41 U.S.C. § 605(c)(1) that the "contractor" certify contract claims exceeding $50,000 and (ii) the force and effect of FAR 33.207(c)(2), promulgated by the Office of Federal Procurement Policy (OFPP), which purports to define, and therefore limit, the persons who may certify contract claims on behalf of a "contractor" that is not an individual. The court below held that the FAR certification regulation not only has the

force and effect of law, but also defines the subject matter jurisdiction of the courts and agency boards of contract appeals.

A. Statutory History

In recognition of the "far-reaching impact [of Government procurement] on the economy of our society and on the success of many major Government programs," Congress enacted the Contract Disputes Act of 1978 (CDA) in order to provide "a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 1, 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235, 5238. This theme was echoed by President Carter on signing the Act into law:

> [The CDA] provides for the first time a uniform statutory base for the resolution of claims and disputes arising in connection with Federal contracts. The previous process was a mass of confusing and sometimes conflicting agency regulations, judicial decisions, decisions of agency boards of contract appeals, and statutes. This act will provide a much more logical and flexible means of resolving contract disputes. It should lead to savings for Federal agencies and contractors.

Statement by President Carter upon signing the CDA into law on November 1, 1978, 14 Weekly Comp. Pres. Doc. 1922 (Nov. 6, 1978).

Enactment of the CDA marked the culmination of an effort begun nearly a decade earlier when Congress created the Commission on Government Procurement. *See* S. Rep. No. 1118 at 4. "Until that time

there had been no comprehensive examination devoted exclusively to the system by which claims by and against the Government with regards to Government contracts should be adjudicated." *Id.* Prior to the CDA, Congress had "never passed into law its definition of how the process should work." *Id.*

The CDA was designed to cure the problems previously caused by agency manipulation of contractors' access to courts and boards of contract appeals. Prior to the CDA, the forums for resolving contract disputes existed by "executive branch fiat—that is, by the insertion of contract terms specifying how disputes in specific areas will be resolved—and by agency regulations governing the procedural and substantive adjudication of disputes." *Id.* at 2. The CDA was enacted because Congress perceived the need to eliminate the agencies' ability to define the jurisdiction of contract claims forums in order to provide a fair, balanced, and efficient system for resolution of contract disputes. *Id.* at 2-4. Congress believed it was necessary to improve the system because "[t]he way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business." *Id.* at 4.

B. Factual Background and Proceedings Below

Petitioner Grumman Aerospace Corporation manufactures carrier-based aircraft for the U.S. Navy. The bulk of its revenues derive from contracts with the Government.[1] The claim at issue in this case had

[1] Grumman Aerospace Corporation is a wholly owned subsidiary of Grumman Corporation, a publicly held corporation whose principal place of business is New York.

its genesis in a decision by the Defense Contract Audit Agency to disallow employee compensation costs incurred on forty-three cost reimbursement contracts between Grumman Aerospace and the Government. The costs that were disallowed were dividends paid to employees on restricted stock awards.[2] The dispute implicated employee compensation costs amounting to several hundred thousand dollars per year.

On January 7, 1987, after unsuccessful attempts at informal resolution of the dispute, Grumman Aerospace filed a claim with the contracting officer for reimbursement of the disallowed costs. The claim was certified by Carl A. Paladino, Senior Vice President-Finance of the Aircraft Systems Division of Grumman Corporation and Treasurer of Grumman Aerospace Corporation.

The claim was denied, and Grumman Aerospace appealed to the Armed Services Board of Contract Appeals, invoking its jurisdiction under 41 U.S.C. § 607(d). After a hearing on the merits, the Board sustained the appeal and held that the company was entitled to recover all of the challenged costs.

The Board also reviewed and accepted the sufficiency of Mr. Paladino's certification:

> The Government moves to dismiss the appeal because of a faulty certification based upon its view that Mr. Paladino was not the proper official within the corporation to sign

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[2] In 1978, Grumman Corporation, Grumman Aerospace's parent, adopted a Restricted Stock Award Plan. The purpose of the plan was to provide incentive compensation to employees. The opinion of the Armed Services Board of Contract Appeals describes the plan in more detail. App. B, 21a-23a.

> the certification. As Senior Vice President and Treasurer, Mr. Paladino was a proper official within the organization to make the certification and we therefore deny the motion to dismiss.

App. B, 33a (citations omitted).

On appeal, the United States Court of Appeals for the Federal Circuit vacated the decision of the Board. In its initial, nonprecedential opinion dated October 1, 1990, the panel (Judges Markey and Michel and Senior Judge Miller) ruled that—based on its interpretation of the certification regulation—there was not "substantial evidence" to support the Board's holding that Mr. Paladino was qualified to certify Grumman Aerospace's claim. App. C, 41a. The panel held that failure to satisfy the certification regulation deprived the Board of jurisdiction to decide the appeal. App. C, 40a.

In its second, precedential opinion, the same panel granted Grumman Aerospace's petition for rehearing "to the extent of considering and disposing of" the arguments therein, but adhered to the original result and vacated the decision of the Board for lack of jurisdiction. App. A, 2a.

As an initial matter, the panel held that Mr. Paladino was not a "senior company official in charge at the contractor's plant or location involved" pursuant to 48 C.F.R. § 33.207(c)(2)(i). The panel interpreted this prong of the regulation to require that the official must "have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." App. A, 9a (emphasis in original). The panel also held that

Mr. Paladino lacked "overall responsibility for the conduct of the contractor's affairs" because "an individual having overall responsibility for just the contractor's financial affairs would not fit the description" in the regulation. App. A, 10a.

Second, the panel rejected Grumman Aerospace's claim that the regulation is unlawful because it conflicts with the CDA certification provision, 41 U.S.C. § 605(c)(1). The panel acknowledged that the Act requires only that "the contractor" certify the claim, but rejected the proposition that anyone who can bind the contractor under traditional principles of agency is authorized under the statute to certify claims. Instead, the panel held that the statute leaves a "gap" that the regulation permissibly fills. App. A, 5a.

Finally, the panel declined to examine the soundness of prior decisions holding that the certification requirement is a jurisdictional prerequisite that must be satisfied before boards or courts may act on a contractor's appeal. App. A, 7a-8a.

Judge Plager, joined by Judges Newman, Lourie, and Rader, filed a dissent from the court's refusal to rehear the case *en banc*. The dissent disagreed with each of the panel's holdings.

First, the dissent concluded that, if the regulation were consistent with the statute, Mr. Paladino would meet the regulation's description of an officer having overall responsibility for the conduct of the contractor's affairs. App. A, 16a. The dissent noted that the subject matter of the claim—whether dividend payments on restricted stock awarded to employees is a reimbursable contract cost—was an issue upon which the certifying official, the Senior Vice President-Fi-

nance and Treasurer, would be "among the most knowledgeable and responsible" corporate officials. App. A, 15a.

Second, the statute on which the regulation is based, 41 U.S.C. § 605(c)(1), requires the "contractor" to certify the claim. As the dissent observed, "the statute delegates *to the contractor* the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures." App. A, 15a (emphasis in original). The regulation as construed by the panel is not consistent with the statute and therefore is invalid. App. A, 15a.

Finally, the dissent contended that the failure properly to certify a claim under the CDA does not deprive a board or court of subject matter jurisdiction. Rather, improper certification means only that the particular claimant has failed to state a claim for which relief may be granted. To confuse subject matter jurisdiction with entitlement to relief creates "not only analytical difficulties, but practical ones as well." App. A, 17a.

REASONS FOR GRANTING THE WRIT

As a government contractor—specifically, as a defense manufacturer whose principal customer is the U.S. Government—Grumman Aerospace is mindful of Justice Holmes's admonition that "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920). Grumman Aerospace is accustomed to turning square corners, for—as with all defense contractors—every aspect of its business dealings with the Government is controlled by stat-

utes and regulations. *See United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1503-04 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987).

With respect to its certification of contract claims, Grumman Aerospace followed the law as it existed in decisions of the agency boards and the United States Claims Court at the time of the claim submission in 1987. Prior to the decision in this case, no court had ever held that a knowledgeable and responsible corporate officer could not validly certify a government contract claim on behalf of a corporation. *Triax Co. v. United States*, 20 Cl. Ct. 507, 511 (1990). Indeed, the decision below is not only unprecedented, it is also inconsistent with the language of the regulation and conflicts with the statute which the regulation purports to implement, 41 U.S.C. § 605(c)(1).

What makes the decision especially pernicious is that the court reaffirmed prior decisions holding the certification requirement to be jurisdictional. As a consequence, numerous cases pending before agency boards of contract appeals and the Claims Court are now nullities.[3] Contractors that filed these claims in

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[3] As a direct result of the lower court's decision, the Armed Services Board of Contract Appeals dismissed the following cases for improper certification in the month of March 1991 alone: *Newport News Shipbuilding and Drydock Co.*, ASBCA No. 33244 (March 4, 1991) (WESTLAW, FGC-BCA library); *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323 (March 21, 1991) (WESTLAW, FGC-BCA library); *William L. Crow Constr. Co.*, ASBCA Nos. 40998 and 41508 (March 27, 1991) (WESTLAW, FGC-BCA library); *PCL Civil Constrs., Inc.*, ASBCA No. 41881 (March 27, 1991) (WESTLAW, FGC-BCA library). In the *Newport News* case, the original claim for over $8 million was filed on January 21, 1986, and the dismissal

reliance upon existing case law must begin the claims process anew by submission of a certified claim to the contracting officer, wasting, for no good purpose, the resources of litigants and the judiciary alike. In addition, contractors will lose the statutory interest to which they are entitled.[4] What is worse, if the certification requirement is jurisdictional, then submission of an improperly certified claim will not toll the statute of limitations, and many claims will be lost forever. *See, e.g.*, 10 U.S.C. § 2405 (limitations on adjustment of shipbuilding contracts).

The decision below thus condones and resurrects the very wrong that Congress legislated against when it passed the CDA—manipulation of the jurisdiction of contract dispute forums by the agencies opposing contractor claims. The panel's decision, moreover, creates additional certification requirements out of whole cloth—such as that the certifying official must "have both primary responsibility for the execution of the contract *and* a physical presence at the location of

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on March 4, 1991, more than five years later, came only after a full hearing and post-trial briefing on the merits of the case. In *Ingalls*, the contractor's claim in excess of $3 million was submitted in July of 1987 and dismissed in March of 1991, thus nullifying nearly four years' worth of proceedings. Furthermore, the Board has begun a review of certifications in all pending cases to determine how many other cases must be dismissed following the decision below. *See* 55 Fed. Contracts Rep. (BNA) 369 (March 25, 1991). Thus the pace of dismissals may be expected to accelerate.

[4] *See, e.g., Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). As the dissent below noted, the panel's decision gives the Government "more years to avoid paying its just debts," and denies to contractors "the interest on the money due that the statute requires be paid." App. A, 16a.

the primary contract activity"—thus encouraging the agencies to do likewise. App. A, 9a. Indeed, the panel's decision invites a never-ending stream of elaborations on who may certify, so that contractors will never be certain that they will have access to a forum able to adjudicate their claims. The decision below has made a travesty of the remedial purpose of the CDA—to provide a "fair, balanced, and comprehensive statutory system" for resolving contract disputes. S. Rep. No. 95-1118 at 1.

Over the past decade, the contract dispute resolution process has been burdened with an ever-proliferating "law of claim certification." With each decision on the meaning of the certification regulation, the law has become less clear and less certain. Because the ground rules are constantly changing, the contracting community can no longer rely on precedent. The regulation at issue here was entirely unnecessary; the law of agency could have been applied to decide whether the "contractor" had indeed certified the claim. Even if administrative agencies can be expected to issue many regulations that are not necessary, a court should not—without clear direction from Congress—burden the disputes process by elevating an unnecessary regulation to jurisdictional status.

This case is significant not only to Grumman but to all companies that contract with the Government. It is also ripe for review. There can never be a conflict among the circuits on this issue, for the Federal Circuit has exclusive jurisdiction of appeals from decisions of the Claims Court and the agency boards of contract appeals. 28 U.S.C. § 1295(a)(3), (10). But the strong dissent filed in this case by four members of

the Federal Circuit underscores the seriousness and significance of the decision filed below.

I. The Court's Restrictive Interpretation of 48 C.F.R. § 33.207(c)(2) Is Inconsistent with the Text of the Regulation and Conflicts with the Statute on Which It Is Based.

The starting point in every case involving construction of a text is the language of the text itself. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

48 C.F.R. § 33.207(c)(2) provides that individuals who may certify claims on behalf of a corporation may be drawn from either of two categories:

> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

Certainly there is ambiguity in both categories. By focusing, as the panel below did, on the phrase "official in charge" in subsection (i), or on the phrase "having overall responsibility" in subsection (ii), one might conclude that the most senior person at the plant (subsection (i)) or the most senior overall corporate official (subsection (ii)) must certify a claim. Under this interpretation anyone who reports to anyone else cannot be "in charge," and in most cases only one person will have "overall responsibility" for *all* of a corporation's affairs. Thus, although the court below adamantly denied it, App. A, 10a, it is hard to dispute that, under the panel's ruling, only *the* plant manager or *the* chief executive officer of a cor-

poration can certify claims under the two subsections of the regulation.[5]

The most immediate objection to this interpretation is that, had the regulators intended it, they would have said so in plain English: "All claims by a corporation shall be certified by either the plant manager or the CEO." They did not.

Moreover, upon the face of the regulation the panel's interpretation is grammatically impossible. Both subsections begin arrestingly with indefinite articles, "a" and "an." These articles are called "indefinite" precisely because they do not identify a specific individual, but rather identify qualities that an individual must have. Accordingly, these articles demand an interpretation that allows a number of individuals to certify under each subsection. And such

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[5] The panel's opinion, however, may not be susceptible of such a clear meaning. The panel's pronouncement that a "senior company official" in charge at the plant or location involved must have a "physical presence at the location of the primary contract activity," App. A, 9a, has been interpreted by the Armed Services Board of Contract Appeals to mean that the official must spend a majority of his or her time at the site. *See William Crow Constr. Co.*, ASBCA Nos. 40998 and 41508 (March 27, 1991) (WESTLAW, FGC-BCA library) (inconsistency between assertions that Vice President spent "much" of his time at site and "the majority" of his time at the site required dismissal). On the other hand, the Claims Court and the Board have also interpreted this prong of the regulation to require that the certifying official be a senior official of the company and not just the most senior official on site. *Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 736 (1990); *PCL Civil Constrs., Inc.*, ASBCA No. 41881 (March 27, 1991) (WESTLAW, FGC-BCA library). So a plant manager may not be a "senior company official," and there may be no "senior company official" who spends all or a majority of his time at the site. This is the end to which hypertechnical interpretations lead us.

an interpretation is perfectly consistent with the language of the entire regulation.

In common parlance numerous people have "overall responsibility" for the conduct of a corporation's affairs. In this case, Mr. Paladino had "overall responsibility" for financial matters, including the cost allowability of dividends on restricted stock. This interpretation is required by—and the panel's interpretation is inconsistent with—the statute upon which the regulation is based.

Regulations must be construed consistently with the statutes they purport to implement. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The CDA, 41 U.S.C. § 605(c)(1), provides in relevant part:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

The statute requires the "contractor"[6] to certify the claim. An individual properly appointed by a corporation as an officer or agent has the authority to bind the corporation within the scope of his or her authority. *See, e.g., Little River Lumber Co. v. United States*, 21 Cl. Ct. 527, 533 (1990) (holding a corpo-

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[6] "Contractor," in turn, is defined in the Contract Disputes Act as a party to a government contract other than the Government. 41 U.S.C. § 601(4).

ration's outside attorney qualified to certify a contract claim, under the statutory provision as opposed to the regulation). Thus, the dissent correctly asserts that "[t]he statute delegates *to the contractor* the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures."[7] App. A, 15a (emphasis in original).

The legislative history of the purpose of the certification requirement, though scant, supports this interpretation. The requirement was added by Senator Byrd to S. 3178, the Senate version of the CDA, on the day it passed the Senate. 124 Cong. Rec. S18640 (daily ed. October 12, 1978). The requirement is not addressed in any committee report or in the explanation accompanying the floor amendment.

The origins of certification appear to lie in testimony offered before the Senate by Admiral Rickover. He recommended that all claims submitted to the government, not just those over $50,000, be certified by the contractor. Rickover stated:

> The following provisions should be added to speed up the contract disputes process . . . .
>
> One: Require as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate

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[7] The dissent asks rhetorically whether a corporate vice president in charge of government contract certifications would fail the panel's test, implying that he would. App. A, 15a. By contrast, under principles of agency, a corporation could authorize such an official to bind it. Certification by such an official would meet the statutory certification requirement, but not the regulatory one as interpreted by the panel below.

> signed by *a senior responsible contractor official*, which states that the claim and its supporting data are current, complete and accurate.

Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787, and S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1978) (emphasis added). In written submissions, this recommendation was variously phrased by Rickover as "the contractor shall certify that the claim and supporting data are current, complete and accurate . . . ," *id.* at 13, and as "the contractor must submit a signed certificate from a senior contractor official . . . . " *Id.* at 33.

Congress ultimately adopted a certification requirement, which appears in 41 U.S.C. § 605(c)(1), but it did not use Admiral Rickover's language specifying who may certify. Indeed, strong evidence exists that Congress positively rejected a certification requirement of the sort recommended by him and imposed by the court below. In the Department of Defense Appropriation Authorization Act of 1979—passed contemporaneously with the Contract Disputes Act—Congress did adopt Admiral Rickover's suggestion. Pub. L. No. 95-485, § 813, 92 Stat. 1611, 1624 (1978). The House bill passed in May 1978, H.R. 10929, provided for certification of defense contract claims exceeding $100,000 by "*the* senior company official in charge at the plant or location involved." H.R. 10929, 95th Cong., 2d Sess. § 808 (1978) (emphasis added). When the House and Senate conferees met, this certification

language was significantly modified, requiring certification by "a" rather than "the" senior company official. H.R. Rep. No. 1402, 95th Cong., 2d Sess. (1978), at 55. This requirement was signed into law on October 20, 1978, and is currently codified at 10 U.S.C. § 2410.

The conclusion to be drawn from the parallel legislative history of the two statutes is that, in the CDA, Congress considered but declined to adopt Admiral Rickover's suggestion that the appropriate certifying official be specified.

The legislative evidence suggests that the certification requirement of 41 U.S.C. § 605(c)(1) was designed to trigger a contractor's potential liability and thus deter the submission of unwarranted claims. *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1429 (Fed. Cir. 1989). Requiring the "contractor" to certify a claim fulfills completely this purpose. Any corporate officer or employee who, under traditional agency principles, can bind a corporation would satisfy this requirement. The dissent below is surely correct in suggesting that if the Government seriously questions the authority of an employee to bind the corporation, it need only demand proof of that authority. App. A, 16a.

If the panel's interpretation of the regulation is correct, then the regulation takes from the contractor what the statute grants—the prerogative to designate who speaks for it. As interpreted by the panel, the regulation flatly contradicts the statute and is, therefore, invalid. *United States v. Larionoff*, 431 U.S. 864, 873 (1977). As stated succinctly by the dissent:

"[e]ither the panel or the regulation is wrong." App. A, 16a.

In this case, Mr. Paladino's authority to bind Grumman Aerospace Corporation is not in dispute. As the dissent observed, Mr. Paladino is precisely the sort of person who ought to certify the claim at issue in this case:

> The subject matter of the claim is whether certain dividend payments on stock awarded to the contractor's employees are includable elements in cost reimbursable contracts. The officer certifying the claim was the corporation's Senior Vice President and Treasurer. Obviously, such an official would be among the most knowledgeable and responsible in assessing such a claim.

App. A, 15a. This Court should grant the petition and reverse the judgment of the court of appeals.

II. The Certification Regulation Is Not Entitled to Deference Because It Was Promulgated Without Statutory Authority and Is an Unreasonable Interpretation of the Contract Disputes Act.

The panel erroneously deferred to OFPP's interpretation of the statutory certification requirement, purportedly based on the authority of this Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). App. A, 5a. The panel, however, ignored a fundamental prerequisite to application of the *Chevron* analysis—namely, that the agency interpretation in question must have been issued pursuant to a congressional delegation of authority which is at least implicit, if not explicit. Where an agency is not charged

with administering a statute, there is no implicit authority under *Chevron*. *See Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring):

> The law in question . . . is not administered by any agency. . . . [I]n a general way all agencies of the Government must interpret it . . . in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*.

Because Congress never gave OFPP or any other agency responsibility for administering the CDA, no agency regulation interpreting the CDA certification requirement is entitled to deference under *Chevron*.

The CDA strictly limited OFPP's role to that of issuing "guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards." 41 U.S.C. § 607(h). The Senate Report elaborated on OFPP's limited role as follows:

> The authority of the [OFPP] Administrator in the establishment of agency boards is limited to developing the workload study formats; being the central clearing point for collection of each of the agency's workload studies; and acting in concert with the agency head in the establishment of each board. The Administrator shall not set up rules and regulations that would give him the power to unilaterally set up or terminate a board.

S. Rep. No. 95-1118 at 27.

OFPP's limited authority was further circumscribed by floor amendment just prior to passage of the CDA. As originally reported out of committee, and until

amended on the Senate floor just prior to passage, S. 3178 empowered OFPP to "issue *rules and regulations* with respect to—the establishment, functions, and procedures of the agency boards . . . . " 124 Cong. Rec. S18636 (daily ed. October 12, 1978) (emphasis added). The floor amendment deleted the words "rules and regulations with respect to" and inserted the words "*guidelines* with respect to criteria for." *Id.* at S18640 (emphasis added). Thus, Congress expressly withdrew from OFPP, prior to passage of the CDA, any authority to issue binding rules and regulations even with respect to agency board procedures or functions. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (guidelines treated as interpretative rules).

Congress, furthermore, never authorized OFPP to play any role with respect to the establishment, functions, or procedures of the United States Claims Court. Thus, there is not even a colorable basis for deferring to OFPP's interpretation insofar as the jurisdiction of that court is concerned.[8] If one accepts the premise of the panel below, that OFPP is authorized by the CDA to circumscribe the jurisdiction of the agency boards, one is left with an anomaly clearly contrary to congressional intent—that compliance with the certification regulation is necessary to invoke the jurisdiction of an agency board, but not the jurisdiction of the United States Claims Court.

Even if OFPP had been authorized by the CDA to issue an interpretation of the certification require-

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[8] The statutory grant of jurisdiction to the Claims Court to hear and decide claims against the government is contained in the Tucker Act, 28 U.S.C. § 1491.

ment, the regulation as construed by the panel below would still be invalid, for it is entirely unreasonable and in direct conflict with the statute. *See Chevron*, 467 U.S. at 844 (unreasonable agency interpretation not entitled to deference). The deference accorded to administrative interpretations pursuant to the doctrine of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), is tempered, as this Court has said, by the realization that courts may not "rubber-stamp" rulings that are " 'inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965)). Both the courts and the agencies " 'must give effect to the unambiguously expressed intent of Congress,' " and the traditional deference accorded agency interpretations cannot be applied to alter that intent. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron*, 467 U.S. at 843).

In this case, the intent of Congress to delegate "*to the contractor* the power to designate who speaks for it," App. A, 15a, is clear. It is also clear that Congress did not intend for OFPP to issue regulations affecting the exercise of subject matter jurisdiction by contract claims forums, and in fact intended to end agency manipulation of such jurisdiction. Therefore, OFPP's claim certification regulation cannot be upheld.

III. Claim Certification Is Not a Prerequisite for Subject Matter Jurisdiction.

As noted earlier, what renders the decision below particularly harmful is the court's holding that a de-

fect in certification is jurisdictional. Over strong dissent, the court below declined to reexamine this issue, deciding instead to rely on "the extensive case law holding otherwise." App. A, 7a.

The provenance of this doctrine appears to be *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct. Cl. 1982). The *Lehman* court analyzed the certification requirement by quoting extensively from the testimony of Admiral Rickover, discussed above in Section I. From this testimony, the court concluded that "[u]nless that requirement is met, there is simply no claim that this court may review under the Act." *Id.* at 355. Subsequent decisions made the further inference based on *Lehman* that certification is a jurisdictional prerequisite to consideration of a contract claim. *E.g., W.H. Moseley Co. v. United States*, 677 F.2d 850, 852 (Ct. Cl.), *cert. denied*, 459 U.S. 836 (1982); *Skelly & Loy v. United States*, 685 F.2d 414, 416 (Ct. Cl. 1982); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1337-39 (Fed. Cir. 1983).

This conclusion is a *non sequitur*. From the proposition that a statute contains a requirement, it does not follow that the requirement is jurisdictional. In fact, there are sound reasons to conclude that the certification requirement is not jurisdictional.

As an initial matter, the certification requirement does not look like—it does not have the "legal character of"—a condition of subject matter jurisdiction. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982). Rather, it appears to be a procedural requirement. Jurisdiction is "the power of a federal court to act." *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 69 (1935). By contrast, certification is a prerequisite to a contracting officer's consideration

of a claim in excess of $50,000. This is akin to a filing fee or to the signature required of all pleadings in federal court. Fed. R. Civ. P. 11. *See Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) ("Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction" (citing *Snyder v. Harris*, 394 U.S. 332 (1969))). The certification requirement simply "does not speak in jurisdictional terms." *Zipes*, 455 U.S. at 395.

Not only is the language of the certification requirement non-jurisdictional in character, its location within the Contract Disputes Act itself suggests that the requirement is not jurisdictional. Jurisdiction is set forth in 41 U.S.C. § 607(d). If certification were a jurisdictional element, presumably it would appear in that section. It does not. Rather, the requirement appears in § 605(c)(1), which addresses the procedures for submitting claims to contracting officers.

Moreover, because a major focus of the CDA was the jurisdiction to be granted to the agency boards, as reflected in the legislative history, *see generally* S. Rep. No. 95-1118, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235, one must take seriously the precise language of the jurisdictional section, as well as the distinct location of the certification requirement. Under these circumstances, it strains credulity to believe that Congress could have intended the certification requirement to be a jurisdictional prerequisite.

Like reasoning persuaded this Court in *Zipes* that the timely filing of charges with the EEOC is not a jurisdictional prerequisite to filing a lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e *et seq.* That statutory filing requirement provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .

42 U.S.C. § 2000e-5(e). Noting that this provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts," the Court held that the requirement was "like a statute of limitations" and therefore "subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393-94.

There are, moreover, sound policy reasons why the certification requirement at issue in this case cannot be jurisdictional. The interpretation of jurisdictional requirements is informed by considerations of practicality. *E.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989) (parties "should not be compelled to jump through . . . judicial hoops merely for the sake of hypertechnical jurisdictional purity"). As a result, this Court has established bright-line tests for determining federal court jurisdiction.[9]

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[9] For example, from the earliest days of the federal judiciary, diversity jurisdiction was decided once and for all at the beginning of the litigation. *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). This proposition was reaffirmed this Term. *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 111 S. Ct. 858, 860 (1991). Similarly, the failure of a damage award to satisfy the jurisdictional minimum does not vitiate the district court's diversity jurisdiction if the minimum was pled in good faith. *E.g., Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938).

It is an extravagant waste of resources to have jurisdiction ascertained only after plenary hearing and appeal. *Newman-Green*, 490 U.S. at 838 ("Nothing but a waste of time and resources would be engendered by . . . forcing these parties to begin anew"). This case exemplifies such waste. Grumman's claim was certified by Mr. Paladino in January 1987 prior to the review by the contracting officer. The court below issued its decision over four years later in February 1991. Under its decision, everything that happened in those years—appeal to the Board, preparation for trial, trial, briefing, and appeal to the Federal Circuit—is a nullity.

Finally, a holding that certification is jurisdictional invites manipulation and abuse. The subject matter jurisdiction of the federal courts may always be challenged. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379 (1884). When the rules governing jurisdiction are unclear, a litigant can hold back a jurisdictional challenge and argue it later if the litigation goes badly. Such a rule of law truly, as the dissent argues, "sets a trap for the unwary" and has never been countenanced by this Court. App. A, 16a. For example, in *Granberry v. Greer*, 481 U.S. 129 (1987), this Court ruled that the failure to exhaust state remedies in habeas corpus proceedings is not jurisdictional. Among other grounds for this decision, the Court fastened upon the practical: "We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' . . . is over." *Id.* at 132 (citing *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977)).

In this case, the Government's answer in the Board proceeding admitted without qualification that the

Armed Services Board of Contract Appeals had jurisdiction over this matter under the Contract Disputes Act. The Government did not argue that the Board lacked jurisdiction to consider the appeal until the record was closed.[10] To be sure, if certification is jurisdictional, the validity of the certification may be raised at any time. *E.g., Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). But the CDA's certification requirement is not jurisdictional.

In sum, nothing in the Contract Disputes Act supports the proposition that the certification requirement is jurisdictional. Rather, that requirement "goes only to [claimant]'s entitlement to relief." App. A, 17a.

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[10] Though the Board's decision, App. B., 33a, states the Government moved to dismiss the appeal there was, in fact, no motion to dismiss. The Government's first jurisdictional argument appeared in its post-hearing brief to the Board.

CONCLUSION

For the reasons stated, the Court should grant the writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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May 24, 1991

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-1217

THE UNITED STATES,

Appellant,

v.

GRUMMAN AEROSPACE CORPORATION,

Appellee.

NONPRECEDENTIAL OPINION ISSUED: October 1, 1990

PRECEDENTIAL OPINION ISSUED: February 27, 1991

Before MARKEY, *Circuit Judge,** MILLER, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

MARKEY, *Circuit Judge.*

In our non-precedential opinion of October 1, 1990, *United States v. Grumman Aerospace Corp.*, 918 F.2d 185 (Fed. Cir. 1990) (table), we vacated the decision of the Armed Services Board of Contract Appeals (Board), *Grumman Aerospace Corp.*, No. 34665, 90-1 B.C.A. (CCH) ¶ 22,417 (1989). In that vacated decision, the Board had required the United States to pay contract "costs" presented in a January 1987 claim of Grumman Aerospace Corporation (GAC). We held that the Board lacked jurisdiction because GAC failed to comply with the certification

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* Circuit Judge Markey vacated the position of Chief Judge on June 27, 1990.

requirement of the 1978 Contract Disputes Act, 41 U.S.C. § 605(c)(1) (1988) (the statute) as implemented by Federal Acquisition Regulation 33.207(c)(2), 48 C.F.R. § 33.207(c)(2) (1989) (the regulation). On October 10, 1990, the government requested, pursuant to Rule 47.8(d), that we render our October 1, 1990 opinion precedential because of its "widespread legal interest." On October 15, 1990, GAC filed a "Petition for Rehearing and Suggestion for Rehearing in Banc."[1]

We grant the government's request, grant GAC's Petition to the extent of considering and disposing of the arguments there presented, and adhere to the result set forth in our decision of October 1, 1990.

I. BACKGROUND

This dispute began on February 10, 1986, when the Defense Contract Audit Agency (DCAA) issued forty-three Notices of Contract Costs Suspended and/or Disapproved against forty-three of GAC's cost reimbursable contracts. The notices disallowed, as contract costs, dividend payments on restricted Grumman stock awarded to GAC employees under Grumman's Restricted Stock Award Plan (RSAP). On January 7, 1987, GAC submitted an uncertified claim for the disallowed amount of $48,707 and for similar dividend payments and requested that the contracting officer render a final decision holding that RSAP dividend payments constitute allowable compensable costs. In a letter dated January 19, 1987, Mr. C.A. Paladino, Senior Vice President and Treasurer of GAC, purported to certify the previously submitted uncertified claim.

In a final decision dated March 4, 1987, the Department of the Navy's Corporate Administrative Contracting Of-

[1] On October 15, 1990, the Federal Circuit Bar Association and the Shipbuilders Council of America filed requests to participate as amici curiae. The requests were accompanied by briefs presenting the same arguments as those presented in GAC's Petition and Suggestion.

ficer (CACO) denied GAC's entire claim. GAC appealed to the Board on April 1, 1987 and the government moved to dismiss for lack of jurisdiction, contending that the claim had not been properly certified.

On October 24, 1989, the Board held GAC entitled to recover the cost of the restricted stock dividend payments to its employees. The Board denied the government's motion to dismiss, saying: "As Senior Vice President and Treasurer, Mr. Paladino was a proper official within the organization to make the certification . . . ." *Grumman*, 90-1 B.C.A. (CCH) ¶ 22,417, at 112,606. In support of that conclusion, the Board made two subsidiary findings: (1) "At the time of certification, Paladino's functions included overall responsibility for GAC's financial affairs," *Grumman*, 90-1 B.C.A. (CCH) ¶ 22,417, at 112,601 (Finding of Fact 7); and (2) "Paladino, who provided the certification, reports directly to the President of GAC." *Id.* (Finding of Fact 8). The government does not contest those findings, but says it "challenge[s] the [Board's] legal conclusion that these two findings of fact establish that Mr. Paladino was the proper person to certify GAC's claim."

GAC challenges the validity of the regulation, saying it was promulgated without legislative authority and is in conflict with the statute. In the alternative, assuming validity of the regulation, GAC contends that Mr. Paladino is an appropriate officer to certify the claim. GAC further argues that the effect of our reversal here is to require certification by, and only by, Chief Executive Officers (what GAC calls a "CEO Only" rule).

II. ISSUES

A. Whether the regulation is a reasonable interpretation of the statute.

B. Whether the government properly raised an issue of the Board's jurisdiction.

C. Whether GAC complied with the statute's certification requirement, as implemented by the regulation, with its January 19, 1987 letter signed by Mr. Paladino.

III. OPINION

A. Validity of the Regulation

The statute provides in pertinent part:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

Clearly, certification is required for claims in excess of $50,000. *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983).

The regulation provides that individuals who may properly certify non-individual contractor claims amounting to more than $50,000 may be drawn from either of two categories:

> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

GAC contends that the regulation is invalid to the extent that it imposes certification requirements beyond "the contractor shall certify" language of the statute. GAC would apply agency principles to determine who may properly certify the contractor's claims. However, nothing in the statute nor in its legislative history either requires or suggests that approach. The statute, being silent on the ques-

tion of the individual who may certify a claim for a non-individual contractor, leaves a gap. GAC fails to distinguish between a prohibited ultra vires regulation and a permissible act of administrative gap-filling.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court held that

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

(footnotes omitted); *see also New York Guardian Mortagee Corp. v. United States*, 916 F.2d 1558, 1559 (Fed. Cir. 1990). The regulation is clearly within the congressionally delegated authority of the Office of Federal Procurement Policy "to issue guidelines with respect to criteria for the . . . functions . . . of the agency boards . . . " that "may be necessary or desirable to carry out the provisions of this chapter . . . . " 41 U.S.C. § 607(h) (1988). Further, it is entirely consistent with the statutory section here involved, merely serving to fill the gap implicitly left by Congress respecting *who* may certify pursuant to that section. As this court has noted:

> The [CDA] merely provides that "the contractor shall certify." *The regulation constitutes a reasonable explication of how the "contractor" shall certify, i.e., it identifies the individuals*

> *within the contractor's organization who properly may act for the contractor in certifying. Cf. INS v. Jong Ha Wang*, 450 U.S. 139, 144-45, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981). In terms of Admiral Rickover's suggestion, the regulation specifies the "senior responsible contractor official[s]" who are authorized to sign the certification.
>
> The certification requirement furthers an important objective of Congress by "trigger[ing] a contractor's potential liability for a fraudulent claim under section 604 of the Act," *Skelly & Loy v. United States*, 231 Ct. Cl. 370, 685 F.2d 414, 418 n. 11 (1982), and thus " 'discourag[ing] the submission of unwarranted contractor claims.' " *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354 (Ct. Cl. 1982) (quoting S.Rep. No. 1118, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S.Code Cong. & Admin. News 5235, 5239). "Congress wanted to hold the contractor personally liable, and it considered the best way to do this would be to require contractors personally to certify their claims." *Donald M. Drake Co. v. United States*, 12 Cl. Ct. 518, 519 (1987). *The regulation properly implements this objective by specifying the persons in the contractor's organization who may certify a claim.*

Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426, 1429 (Fed. Cir. 1989) (emphasis added).

Accordingly, we decline GAC's invitation to ignore *Ball* as precedent. On the contrary, we expressly hold that the regulation is not unreasonable, and that it is in furtherance of congressional objectives, is unambiguous, and must be applied literally. *See id.* (holding the regulation "unambiguous" and directing that it be applied "as written"). In sum, the regulation being reasonable, this court may not

substitute its own construction of the statutory provision on which it rests. Nor is the writing or amendment of regulations our proper role. Whether it would to us appear sensible, for example, to allow a senior financial officer to certify a claim for money allegedly owed his corporation is simply irrelevant. We are not privy to all of the agency's reasons for its regulation and lack the expertise developed over the years by the agency in dealing with all aspects of certification. Hence, GAC's arguments based on policy and practicality must be rejected.

B. Jurisdiction

It is well settled that the certification requirement is a jurisdictional prerequisite that must be satisfied by the contractor before it may appeal the contracting officer's claim denial. *See Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989).

GAC argues that compliance with the certification requirement is not a jurisdictional requirement. The argument fails in light of the extensive case law holding otherwise. *See, e.g., Theon v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985) ("Congress has determined that submission of a certified claim to the contracting officer in the first instance is a jurisdictional prerequisite . . . . "); *W.M. Schlosser Co.*, 705 F.2d at 1338 ("Unless the claim was certified when it was submitted to the contracting officer, the Board should have neither heard nor ruled on the appeal."); *Milmark Servs., Inc. v. United States*, 231 Ct.Cl. 954, 956 (1982) ("It is well established that without such a formal claim and final decision by the contracting officer, there can be no appeal to this court under the CDA. It is a jurisdictional requirement."); *W.H. Moseley Co. v. United States*, 677 F.2d 850, 852 (Ct.Cl.) ("Since plaintiff failed to certify its claim as required by section 6(c)(1) of the Contract Disputes Act of 1987, we are without jurisdiction to consider its direct appeal to this court."), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 77

(1982); *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982) ("Unless [the certification] requirement is met, there is simply no claim that this court may review under the Act."); *Triax Co. v. United States*, 20 Cl. Ct. 507, 509 (1990) ("It is well settled that the submission of a properly certified claim to the CO is a jurisdictional prerequisite . . . . "). We see no reason to upset this long-established and well-reasoned precedent.

GAC also argues, now, in its Petition and Suggestion, that the jurisdictional issue should not have been addressed because no certifying signature is required for claims of less than $50,000. The government correctly points out that this is "a new argument that was not presented during the [Board] hearings or to this Court in either its brief or at oral argument." Consequently, GAC is precluded from raising its "need not have been certified" argument at this late date. *See Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 767 (Fed. Cir. 1988); *JMT Mach Co. v. United States*, 826 F.2d 1042, 1048-49 (Fed. Cir. 1987).

Beyond the general rule that jurisdictional facts may be waived if not timely pleaded, GAC's argument respecting the amount of the claim is particularly egregious in light of a colloquy during the Board hearing. When a Member of the Board raised the question, government counsel stated that the total claim exceeds $50,000, and GAC's counsel did not dispute government counsel's exposition. In light of that colloquy, GAC's assertion that its own counsel did not himself assure the Board that its claim exceeds $50,000 comes with poor grace. It is unavailing and inappropriate.

Subject matter jurisdiction may be addressed at any time. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1985). Strictly speaking, however, the Board's subject matter jurisdiction, i.e. its jurisdiction to hear and determine appeals from final decisions of contracting officers on certifying

claims, remains fully intact whatever is done here. Failure of a claimant to certify the claim results in an inability of the Board to exercise its subject matter jurisdiction in that claimant's case. A purist might for that reason view a claimant's failure to certify as a defect in the claimant's standing. On the other hand, it can be said that Congress limited the Board's jurisdiction over contractor's claims to those that are certified. It is in the sense that the Board is given no power to exercise jurisdiction over uncertified claims that the courts have designated certification as "jurisdictional."

Thus GAC's arguments that certification is not jurisdictional and that jurisdiction was present because the claim was for less than $50,000 must be and are rejected.

C. Compliance

GAC says it complied with the regulation because Mr. Paladino was a proper person to certify the claim. Under the regulation, as above indicated, compliance would require certification by *either* "[a] senior company official in charge at the contractor's plant or location involved . . . " *or* "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." Mr. Paladino fits neither description.

The first description demands that the certifying senior company official have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity. Mr. Paladino, as GAC's Senior Vice President and Treasurer, was certainly a "senior company official," but he was not "in charge." He reported at least to Nat Busi, a GAC Vice President and GAC's Controller, who testified that it was he, not Mr. Paladino, who "made the ultimate decision" to present the claim, and that Mr. Paladino "could not pursue the claim . . . without [Mr. Busi's] approval . . . . " There is no indication that Mr. Paladino was responsible for anything more than simply deciding and reporting on whether par-

ticular dividend-like costs were employee compensation chargeable to a series of government contracts. Moreover, GAC has not established that Mr. Paladino was physically present at the "plant or location involved" in the performance of the contract.

The second description requires "overall responsibility for the conduct of the contractor's affairs" in general. The Board said "Paladino's functions included overall responsibility for GAC's financial affairs." However, the regulation requires more than that, and clearly, an individual having overall responsibility for just the contractor's financial affairs would not fit the description. *Ball, Ball & Brosamer*, 878 F.2d at 1429 (holding that an official whose responsibility is limited to financial aspects of a contractor's affairs is not the proper person to certify a claim). GAC has not met its burden of establishing that Mr. Paladino had the overall responsibility for the conduct of GAC's affairs required by the regulation.

GAC grossly exaggerates in arguing that this court held in its earlier opinion, at least by implication, that a corporation's CEO is the only individual that may certify a corporate contractor's claim. Certainly a CEO or one of equivalent status would satisfy the second description, but certification by a CEO is not required by the regulation or by anything said in either of this court's opinions in this case. Indeed, any such requirement would read the first description completely out of the regulation. We hold only that GAC has failed to establish that Mr. Paladino satisfied either requirement of the regulation.

Because the Board's determination that Mr. Paladino was qualified to certify GAC's claim was not supported by substantial evidence, we vacate the Board's decision and remand the case with instructions to dismiss GAC's appeal from the CACO's denial of the claim.

GAC, however, is not without a remedy. Notwithstanding a holding that the Board lacked jurisdiction because

certification was lacking, this court has held that a contractor may properly certify the claim and resubmit it to the contracting officer, and if denied relief the contractor may appeal either to the Board or to the Claims Court. *See Theon v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985); *see also Skelly and Loy v. United States*, 685 F.2d 414, 419 (Ct.Cl. 1982) ("The proper course of action—for a contractor whose case is dismissed for lack of jurisdiction—is the following: (1) properly certify the claim; (2) resubmit the claim to the contracting officer; and (3) if there is then an adverse contracting officer's decision, appeal either to the board (section 606) or directly to this court (section 609).") (footnote omitted). The record does not reflect GAC's reason for declining to submit a new certification in response to the government's motion to dismiss or at any time during the ensuing three years. We will, however, presume existence of a reason sufficiently strong to justify the GAC-induced expenditures of the overburdened resources of the Justice Department, the Board, and this court.

VACATED AND REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1217

THE UNITED STATES,

Appellant,

v.

GRUMMAN AEROSPACE CORPORATION,

Appellee.

PLAGER, *Circuit Judge*, with whom NEWMAN, LOURIE and RADER, Circuit Judges, join, dissenting from the Court's refusal to consider this case in banc.

I respectfully dissent from the Court's refusal to consider this case in banc and to affirm the Armed Services Board of Contract Appeals' (Board) jurisdiction to decide the case.[1] As discussed at the outset of the panel opinion, that opinion had a difficult gestation period, followed by a painful birth. In its original conception, the panel produced a nonprecedential opinion that I believed to be erroneous but, due to its nonprecedential nature, not broadly significant. Had the matter remained merely one of bad result the case might not warrant our continued attention. But by acquiescing in the Government's request for a precedential opinion, this court sets forth a major policy pronouncement that, in my judgment, is simply wrong. In view of the public interest in this issue (as evidenced by the briefs of *amici* cited in the panel opinion) and the importance of its correct resolution to the boards and

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[1] Under Fed. R. App. P. 35(a), a majority of the active judges of this court may, *sua sponte*, order a case to be reheard in banc. In this case, in response to a suggestion from several members of the court, a majority of the active judges did not so order.

courts that hear these cases,[2] I think it appropriate that I state why I believe the decision is wrong.

The panel's pronouncement regarding what is required to certify a claim is not good law. The statute, 41 U.S.C. § 605(c)(1) (1988), requires that "the contractor" certify the claim. The purpose of the certification requirement is clear from the legislative history—the certifier must be an official able to speak for and bind the company regarding the claim. In addition, the legislative history suggests that this mechanism is to prevent fraudulent claims and encourage settlements. Thus, Congress seemingly wanted the person who makes the final decision concerning submission of a claim to be someone with reasonably broad oversight of the company's affairs and not merely a person with an emotional investment in the dispute. Such a person could best determine whether the claim was justified or able to be settled. Indeed, the Office of Management and Budget's Office of Federal Procurement Policy (OMB/OFPP) rule, describing eligible certifiers as including the chief executive officer (CEO) who heads the entire company, clearly

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[2] *See, e.g., Sun Cal, Inc. v. United States*, 21 Cl. Ct. 31, 33-34 (1990) (finding a vice-president and chief financial officer qualified to certify); *Westech Corp. v. United States*, 20 Cl. Ct. 745, 751-53 (1990) (finding certification of claim by former employee of the contractor in combination with a subsequent ratification by the corporation president to be ineffective); *Western Empire Constructors, Inc. v. United States*, 20 Cl. Ct. 668, 671 (1990) (finding a project manager to be a "senior company official in charge at the contractor's plant"); *Triax Co. v. United States*, 20 Cl. Ct. 507, 510-14 (1990) (on reconsideration, an order finding a certification invalid where the senior company officials certifying were not also in charge of the plant was vacated); *National Surety Corp. v. United States*, 20 Cl. Ct. 407, 410-12 (1990) (finding certification by an officer of the parent corporation to be ineffective); *Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 736 (1990) (finding use of "*a* senior company official" rather than "*the* senior company official" in regulation to indicate that certification must be by "a senior official within the company, not just the most senior person on site.")

suggests that no personal involvement in the routine paperwork administration of the contract is expected.

Courts appropriately accord considerable weight to interpretations of an agency with expertise when a statute is ambiguous. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). As we said in *Wilson v. United States*, 917 F.2d 529, 535-36 (Fed. Cir. 1990) (citing *Chevron* at 842-44), "when a statute is silent or ambiguous with respect to the specific issue, the administrative agency's interpretation, if reasonable, is to be followed by the court." Courts thus acknowledge the proper role for experts in policymaking. At the same time, we should refuse to enforce agency interpretations when the statute is not ambiguous and when the interpretation neither demands expertise of an agency nor accords with the thrust of the statute. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). As was said in *Office of Communication of the United Church of Christ v. Federal Communications Comm'n.*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983), "[t]o do otherwise would risk diluting the judiciary's power to stand guard against bureaucratic excesses by ensuring that administrative agencies remain within the bounds of their delegated authority. Indeed, it is the quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority."

The term "contractor" as used in 41 U.S.C. § 605 of the Contract Disputes Act (CDA) is not ambiguous. The statute simply leaves unspecified the exact title of the certifying official appropriate in a given case and in a given corporate structure. Even assuming agency interpretation was needed, the regulation, 48 C.F.R. § 33.207(c)(2) (1989), by limiting the range of officials able to certify as narrowly as it does, goes beyond reasonable interpretation and denies to a wide range of corporate officials that which the statute grants them. Furthermore,

§ 601 of the CDA defines the term "contractor." Congress, by defining "contractor" even in general terms left no room for agencies to adopt stricter or looser definitions of the term. This court should give force to Congress's language and intent.

The statute delegates *to the contractor* the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures. For example, a valid regulation might specify that the officer who certifies for the contractor must be one whose position within the contractor's organization is such that he or she has authority to speak for and to bind the corporation concerning the matters involved in the claim. By contrast, a regulation that stated that corporate vice-presidents could *never* certify a claim would not be consistent with the statute and therefore would not be valid—this regulation as construed by the panel does essentially that, and it is not.

The facts of this case demonstrate the unreasonableness of OMB's regulation, at least as it is construed by the panel. The subject matter of the claim is whether certain dividend payments on stock awarded to the contractor's employees are includable elements in cost reimbursable contracts. The officer certifying the claim was the corporation's Senior Vice President and Treasurer. Obviously, such an official would be among the most knowledgeable and responsible in assessing such a claim. Can it be said that the Congress had in mind that *only* the civil engineer who is the plant manager could certify the claim if the president of the company was busy doing other things? (What if there are a number of plants affected? What if there were a "Senior Vice President for Certifying CDA Claims"?) Or, if the manager at one of many plants of a large corporation was ill, can it be said that Congress intended to require that the CEO, located in corporate headquarters 2000 miles from the plant, personally certify a $55,000 claim on a $400 million contract?

The Board of Contract Appeals which heard this case considered the Senior Vice President a proper certifier on the grounds that he met the regulation's description of an officer having overall responsibility for the conduct of the contractor's affairs, in this case, financial affairs. The panel disagreed, concluding that the regulation means affairs *in toto*, i.e., the CEO. Either the panel or the regulation is wrong. In either case, the rule announced by the panel should not be allowed to become a binding precedent of this court.

If the Government is genuinely in doubt about the authority of the certifier to bind the contractor, it is a simple matter for the Government to challenge this authority before the Board. It would be equally easy for the contractor to then verify that authority. But that is not what the Government seeks. The Government's position instead sets a trap for the unwary, requiring that claims falling short of its technical trap be re-started, thus giving the Government more years to avoid paying its just debts, if they are ultimately found to be just, and to deny the contractor the interest on the money due that the statute requires be paid. The large defense and other contractors who regularly do business with the Government, and who have the legal resources to closely follow the arcane requirements laid down in this area, will find the certification process imposed by this decision onerous but manageable. It is the small companies who seldom do business with the Government and who can least afford delayed payments with no interest paid for the delay, who likely will be caught and most hurt by this construction of the regulation. This court should not countenance any such distortion of the remedial purposes of the Contracts Dispute Act.

Finally, the court lets pass an opportunity to correct what I consider a long-standing error, judicially created, regarding the jurisdiction of the boards and courts which hear these cases. The panel opinion holds that the failure to properly certify the claim deprives the Board, and there-

fore this court, of jurisdiction over the cause. But failure to properly certify a claim under the CDA does not speak to subject matter jurisdiction—it merely means that the particular claimant has failed to state a claim for which, under the terms of the statute, relief may be granted. Subject matter jurisdiction over CDA claims is determined by statute granting that jurisdiction to specified boards and courts. A party's failure to do all that is required to certify a claim goes only to that party's entitlement to relief. To confuse the two creates not only analytical difficulties, but practical ones as well. Admittedly, the panel is correct that the error is long-standing (see the discussion under *Jurisdiction* in the panel opinion), but that is no reason to continue its perpetuation since no investment expectations are likely to have been made in reliance on it. This whole area could benefit from a thorough reexamination by the court in banc.

APPENDIX B

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 34665

Appeal of –

Grumman Aerospace Corporation

Under Contract No. N00014-82-C-2418, et al.

APPEARANCES FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

At issue in this appeal is whether dividend payments [1] made to employees of Grumman Aerospace Corporation on restricted Grumman Corporation stock previously awarded to said employees are allowable compensation expenses.

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[1] At trial and in the briefs the parties used the term dividend equivalents to describe dividends on restricted stock in order to distinguish it from dividends on unrestricted stock.

The contracting officer determined that the payments were not compensation for services rendered and were disallowed. This appeal followed.

The record consists of the transcript of a two-day hearing at the Board, a stipulation of facts by the parties, documents submitted by both the Government (R4, tabs 1-19) and Appellant (R4, tabs 20-124) pursuant to Board Rule 4 and appellant's exhibits received at the hearing (exh. A-1-3). Also included in the record are prefiled statements of three expert witnesses. The appeal is processed under the Contract Disputes Act of 1978, 41 U.S.C. § 601-613, and only entitlement is at issue.

FINDINGS OF FACT

1. Grumman Corporation (Grumman or GC) is duly authorized and existing under the laws of the State of New York and has a wholly-owned subsidiary, Grumman Aerospace Corporation (GAC), also a New York corporation (Stipulation ¶ 1). GAC is the appellant in this appeal.

2. GC views a well-balanced compensation program for its senior executives to be comprised of three elements — the base salary, an annual bonus opportunity reflecting performance during a particular period and finally a long-term incentive compensation element which usually takes the form of a stock ownership opportunity. The stock programs tend to align the interests of the individual with the interests of the shareholders. (Tr. 1/29)

3. GC has included a stock option program as part of its compensation package for many years, but because of its shortcomings, such as unattractive prices, management felt it should investigate the alternative of a restricted stock award plan. The firm of Booz, Allen & Hamilton, which was commissioned to study the matter, recommended that the company adopt a restricted stock program. (Tr. 1/29-30)

4. In March 1978, the Board of Directors of GC approved a Restricted Stock Award Plan (RSAP) subject to shareholder approval which approval was granted and became effective in July 1978 (Stipulation ¶ 4).

5. The first awards of restricted stock pursuant to the RSAP were made in September 1978. In 1980, GAC first claimed dividend payments made on the restricted stock issued under the RSAP as a contract cost in its final overhead and G&A rate submissions for 1979. (Stipulation ¶ 5)

6. The parties agreed to a bottomline number to settle final overhead and G&A rates for the years 1979 through 1982, with neither party making any concession, admission, or reservation of rights regarding dividend payments made on restricted stock awarded under the Grumman RSAP (Stipulation ¶ 7). The question of the allowability of dividend payments on restricted GC stock is an open item for 1983 and forward. (Tr. 2/17)

7. On 10 February 1987, the Defense Contract Audit Agency (DCAA) issued forty-three token Notices of Contract Costs Suspended and/or Disapproved (Forms 1) against forty-three of GAC's cost-type contracts. The token Forms 1 disallowed the cost of payments made on restricted shares under the RSAP for the year 1983 in the total amount of $48,707. (Stipulation ¶ 6) The disallowed amount was withheld from GAC billings in April of 1986. On 7 January 1987 GAC submitted an uncertified claim for the amount withheld. (R4, tab 16) On 19 January 1987, the claim was certified by C.A. Paladino, Senior Vice President and Treasurer of GAC, using the language prescribed by Section 6(c)(1) of the Contract Disputes Act of 1978 (41 U.S.C 605(c)(1)) for claims exceeding $50,000. At the time of certification, Palidino's [sic] functions included overall responsibility for GAC's financial affairs. The claim was denied by the administrative contracting officer on 4 March 1987 (R4, tab 18).

8. Paladino, who provided the certification, reports directly to the President of GAC.

Purpose of RSAP

9. The objective of the RSAP is to attract good employees, to retain them, and to compensate them fairly for their performance. (Tr. 1/32) There is intense competition for highly trained and experienced technical personnel in Long Island, New York (Grumman's corporate home). (Tr. 1/59) Retention of these highly trained and experienced personnel is essential to maintaining Grumman's position on the cutting edge of technological development and the RSAP has been successful in achieving the objective of retaining these employees. (Tr. 1/60)

10. While the RSAP has existed in GC since 1978, the number of persons who have received awards are a select few, mostly high level employees. Persons receiving awards for the most part had never heard of the plan prior to receiving the award as information about the plan is not given until receipt of an award. (Tr. 1/133, 216)

11. Awards are made at management discretion and there is no guarantee of an award no matter the level of performance. (Tr. 1/124, 1/134)

Comparison of Restricted Stock versus Regular Stock

12. Restricted stock of Grumman Corporation has some but not all the characteristics of ordinary common stock of Grumman Corporation. Recipients of restricted stock may not sell, transfer, pledge or otherwise hypothecate the stock until after a fixed period of time, usually the fifth year, when the restrictions begin to lapse at the rate of 20% per year. (Tr. 1/63, 1/109-110) If a recipient leaves Grumman or any of its subsidiary corporations while there are restrictions on the shares, the restricted stock is forfeited and the right to receive dividends thereon terminates. (Tr. 1/64-65) A recipient does not forfeit shares on

which the restrictions have lapsed when he or she leaves Grumman or any of its subsidiary corporations.

13. Recipients of restricted stock get the same annual report, the same quarterly statement and the same proxy as any other shareholder. They have the same right to attend annual meetings and their votes count in the same manner as any other shareholder. (Tr. 1/45) As well, recipients of restricted stock receive the same gross quarterly dividends declared by the Grumman Board of Directors (tr. 1/216).

14. When an award of restricted stock is made, the stock is listed in the participant's name with a notation of the restrictions which apply and these shares are placed on deposit and retained by the company, as the individual does not receive physical possession of the certificate (tr. 1/47-48, 1/63-64) as they would with ordinary common stock.

15. As the restrictions lapse and the shares begin to vest in the individual, a certificate is issued for the amount of shares so vested and the individual receives the certificate free and clear and subsequently receives dividends on those shares in the normal manner.

16. There have been some exceptions made by Grumman to the rule that restricted stock is forfeited when an employee leaves Grumman. the first is where an employee leaves the company but is retained in a consulting capacity. In these circumstances, Grumman has allowed the original lapsing schedule to run to avoid forfeiture because of the continuing business relationship. (Tr. 1/37)

17. A second exception is where a segment of the corporation is sold and that segment has employees holding restricted stock, Grumman deems service with the new owners to constitute service with Grumman for the limited purpose of the restricted stock in fairness to the employees since it was a company decision to sell. (Tr. 1/38) A third

exception is where a departing employee enters into a noncompete agreement. The company deems this situation equivalent to consulting for purposes of allowing restricted stock lapsing to continue so as to avoid forfeiture. (Tr. 1/49) It should be noted that the plan itself provides that if a recipient "is terminated prior to the lapse of the restriction on his Restricted Stock by reason of death, total disability, or retirement at normal retirement age 65, or later, the restrictions on the Award shall lapse on the date of such termination." (R4, tab 3, ¶ 11).

Comparison of Dividends on Restricted Versus Dividends on Ordinary Stock

18. Retained earnings are a residue of profits that have not been distributed. The payment of dividends, including dividends on restricted stock, out of retained earnings is contingent upon a declaration by the Board of Directors of Grumman Corporation not by GAC. (Tr. 2/33)

19. Dividends on ordinary common stock are paid by a transfer agent or dividend dispersing [sic] agent while dividends on restricted stock are paid by the company (1/40). A separate bank account is maintained for dividend payments on restricted stock because the company views these payments as part of the total payroll picture and wishes to maintain control of it while dividends on regular common stock are not part of the payroll process and there are no company tax concerns. (Tr. 1/200)

20. The tax concerns of the company include the requirement by the Internal Revenue Service that they make tax withholdings on restricted stock dividends which withholdings are reported on Form W-2 along with an employee's base compensation. Thus, the dividend payment received by recipients of restricted stock is net of federal and state tax withholding (tr. 1/52). This differs from dividend payments on ordinary common stock as, for the latter, there is no withholding required and payments are reported to the IRS on Form 1099. (Tr. 1/40)

21. Payment of dividends on regular common stock is not contingent upon performance of services or employment with the company, while payment of dividends on restricted stock is contingent, subject to the exceptions noted above, upon employment with the corporation. (Tr. 1/40-41)

Tax Consequences of RSAP

22. At all times relevant to this appeal, Douglas Dahlgard has been Director of Taxes for Grumman Corporation and at the time the RSAP was proposed he was asked to research and comment on the tax consequences of the plan. (Tr. 1/157-58) He did so and testified as to his conclusions as follows:

> I concluded that the tax treatment as described by the consulting firm was correct and that upon the grant of restricted stock award there is no tax consequences [sic] to the recipient nor is there a tax consequence to Grumman.
>
> On payment of dividends that relate to shares that are still restricted under the award program, the dividends are properly treated as compensation by the individuals and are deductible as compensation paid by the company [GAC].
>
> Once the restrictions lapse on the shares when the service has been performed under the schedule on the plan, there is a taxable event to the recipients and that is measured by the fair market value of the stock on the date that the forfeiture restrictions lapse. That tax consequences [sic], the fair market value of that award at that time, represents compensation to the individuals. It also represents an allowable compensation deduction to the company.

(Tr. 1/159-60)

23. Dahlgard's conclusion with respect to the tax consequences was based in large part on section 83 of the Internal Revenue Code which, in dealing with the transfer of property for services when the property is subject to restrictions, states that there is no transfer of the restricted property for tax purposes as ownership only transfers upon the lapse of the restrictions. Money paid to award recipients represents additional compensation and thus is taxable as ordinary income to the recipient and is deductible as compensation by the company. (Tr. 1/160-161)

24. GAC witnesses, who testified that in their opinion the payment of dividends on restricted stock is allowable for government contract costs purposes, viewed the tax consequences as highly relevant to the analysis leading to that conclusion. Government witnesses, on the other hand, found little, if any, relevance between the tax consequences and the question of whether the payments are allowable.

How Restricted Stocks are Treated for Accounting Purposes

25. Nat Busi is vice president and comptroller of Grumman Corporation. (Tr. 1/182) He testified about the financial and cost accounting treatment of restricted stocks and dividends issued thereunder. During development of the plan, Busi advised the corporation on how he saw the impact of the plan on accounting and contract costs as they affected GAC and thus his concern was both financial accounting and Government contract cost accounting. (Tr. 1/186) He concluded that accounting conventions required that dividends on restricted stock be reported as if they were ordinary dividends for Grumman Corporation. However, since the effect of the plan was to augment a compensation package, Busi concluded that when the cost of the dividends was passed on to the operating units of Grumman such as GAC, the costs should be recorded as compensation costs and reported accordingly. (Tr. 1/186-

87) Busi agreed on cross examination that financial accounting was relevant to the accounting treatment for the parent Grumman Corporation and that cost accounting was relevant to treatment at the segment level of the contractor, GAC. (Tr. 1/187-88)

26. The only accounting entry normally made for dividends is at the parent level wherein Grumman reduces the retained earnings of the corporation and pays the dividends to the holders of the Grumman stock. There would be no accounting entries at all on the books of the segments or operating units (tr. 1/188). For dividends on restricted stock the accounting at the segment level is explained as follows:

> Now with respect to the dividends paid on restricted stock, Grumman Corporation would pay the holders of restricted stock and then would set up a receivable from the operating units, in this case, Grumman Aerospace Corporation, for the dividends that Grumman Corporation had paid to employees of Grumman Aerospace that held restricted stock shares.
>
> Grumman Aerospace would reimburse Grumman Corporation for the dividends that they had paid. Grumman Corporation would pay the withholding taxes which it had withheld to Grumman Aerospace and Aerospace would then remit those taxes to the taxing authority. Just to keep the payroll taxes complete, Aerospace would do that. Aerospace would similarly pay any FICA taxes that might be due on those payments.

(Tr. 1/188-89)

27. While GAC does not now have any financial reporting requirements to third parties other than its parent, Grumman (tr. 2/40-41), for 1984 and 1983 GAC did issue financial statements separate from Grumman. (Tr. 2/13;

exh. A-3) Michael Solomita, Assistant Treasurer of GAC (tr. 2/7), testified that dividends on restricted Grumman stock paid to GAC employees appear in two places on the certified financial statements — on the Consolidated Balance Sheets as an asset under net inventories, and on the Consolidated Statements of Income and Retained Earnings under Wages, Materials and Other Costs and Expenses. (Tr. 2/13-14) He explained the rationale for inclusion in two places as follows:

> They're in two places because all contract costs are reflected: first, as inventory; then, as sales are made. The inventory accounts are relieved for the costs that are associated with those sales. And at that point in time, some portion of the dividends on restricted stock would appear as an income item—or an expense, rather, and would appear as part of this "Wages, Material, and Other Costs and expenses."
>
> The balance of the amount remains in the inventory account until additional sales are generated and those costs are then transferred out into cost of sales.

(Tr. 2-14-15)

28. Solomita explained how the parent and the segment account for dividends on restricted stock:

> The parent company records these dividends as a charge to retained earnings, a financial item, and as a credit to cash. They make a simultaneous entry, which would be a billing to each of the divisions or segments of Grumman Corporation, wherein they would debit account called "Due from Affiliate," whichever affiliate it happened to be, and credit "Miscellaneous Income."
>
> When the corporation receives payment from the various divisions, they would charge their cash

account and relieve the "Due from Affiliate" account.

* * *

Upon receipt of the invoice from Grumman Corporation, the unit that I work for [GAC] makes a charge to compensation expense as an allowable contract cost and sets up a liability to Grumman Corporation.

Subsequently, when payment is made to the corporation, the liability account is relieved and the cash account is credited.

(Tr. 2/12-13)

29. Financial accounting conventions (generally accepted accounting principles) require that dividends not be shown as an expense on the consolidated financial report of the corporation and the accepted practice is to treat dividends on restricted stock in the same manner. (Tr. 1/197, 1/206) Grumman follows that practice and shows dividends paid on restricted stock as dividends paid and reduces the shareholder's equity account by the amount of the dividends paid and does not show these payments as expenses or income for financial reporting purposes. (Tr. 1/213)

30. Grumman does not normally bill dividends to its segments, except in the case of dividends on restricted stock and it only bills the segments during the period before the restrictions lapse. Grumman would not bill its segments for the dividends on restricted stock shares if they were not treating them as a compensation expense. (Tr. 1/213-14)

The Expert Witnesses

31. Heidi Toppel, a compensation consultant, was called as an expert witness by appellant. In her prefiled testimony, Toppel expressed the opinion that the RSAP of Grumman was compensatory in nature (Toppel Q&A No.

31) and that dividend payments on restricted stock under the Grumman RSAP is also compensation, stating:

> A dividend equivalent associated with the RSAP is compensation and is an integral part of the incentive compensation nature of the program. They are distinctly different from ordinary dividends paid to shareholders. Ordinary dividends paid to shareholders are not treated as an operating expense to the company but rather a return of profit on their equity interest. The dividend equivalents paid in accordance with the terms of the RSAP are interim payments to employee recipients of restricted stock awards for the performance of their services during the period to which the dividend equivalents relate. The dividend equivalents are an integral part of the plan to compensate Grumman employees and should not be characterized as transactions with shareholders.
>
> In my view it is arbitrary to identify one aspect of a [sic] incentive compensation program such as the RSAP and contend that it does not constitute compensation simply because it is labelled a dividend or is measured by the amount of a regular dividend.

(Toppel Q&A No. 34)

32. Appellant also called Dr. Louis Rosen, an attorney and a certified public accountant, as an expert witness. When asked his opinion of whether payments to recipients of awards under the Grumman RSAP are allowable costs, he stated:

> My opinion is that the payments to the RSAP recipients that are made while the recipients are holding restricted stock are allowable costs. Unlike true dividend payments to regular stock-

> holders, the payments to the employees who hold restricted stock ("dividend equivalent payments") are contingent upon their continuing performance of services until the restrictions lapse. For this reason, and in consideration of other factors (e.g., that the applicable tax regulations provide that payments on restricted stock are to be treated as compensation), it is my opinion that the dividend equivalent payments made pursuant to Grumman's RSAP are allowable compensation costs.

(Rosen Q&A Nos. 8 and 9)

33. Rosen went on to explain that his opinion was formed after looking to other sources for guidance, including, the RSAP itself, Government contract cost principles and the Cost Accounting Standards, federal tax provisions as they relate to payments on restricted stock programs, Grumman's and GAC's accounting treatment of the RSAP stock and dividends, and fundamental accounting principles (Rosen Q&A No. 10).

34. The Government called Bertold Bodenheimer, a certified public accountant, as an expert witness who expressed the opinion that payment of dividends on restricted stock are dividends and not compensation and thus not allowable, stating:

> Such payments are represented in the company's description of the plan as being dividends. They are treated by the company's independent public accountants as dividends. The payments are made on the basis of a dividend declaration by the Board of Directors. They are unrelated to services performed by the recipient in the period when the payments are made. The payments are of a type which the Internal Revenue Service would question as a compensation deduction. Consequently, the evidence is overwhelming that the

> payments in question are not compensation for services rendered by employees, but dividends on shares in the company.

(Bodenheimer Q&A Nos. 12 and 25)

The Contracts and Cost Principles

35. Contract No. N00014-82-C-2418 (a typical contract included in the Rule 4 file) was awarded on 29 September 1982. The contract incorporated by reference the Allowable Cost Fixed Fee and Payment clause (September 1978 edition) prescribed at DAR 7-203.4(a). Said clause provides in pertinent part that the Government should pay the cost of performance determined to be allowable under Part 2 of Section XV of the Armed Services Procurement Regulations in effect on the date of the contract. The contract also incorporated the Disputes Clause prescribed at DAR 7-103.12, June 1930 edition.

36. The provisions of Part XV which are discussed below were in effect on the date of the contract and are relevant to this appeal.

37. The cost principle set forth in subpart (a)(1) of DAR 15-205.6, Compensation for Personal Services, is broadly stated as follows:

> Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided in 15-205.6(f). It includes, but is not limited to, salaries, wages, directors' and executive committee members' fees, bonuses (including stock bonuses), incentive awards, employee stock options, employee insurance, fringe benefits, contributions to pension, annuity, and management employee incentive compensation plans, allowances for off-site pay,

> incentive pay, location allowances, hardship pay and cost of living differential. Except as otherwise specifically provided in this 15-205.6, such costs are allowable to the extent that the total compensation of individual employees is reasonable for the services rendered and they are not in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder.

38. The cost principles allow for the payment of bonuses and incentive compensation in pertinent part as follows:

> Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards, and incentive compensation based on production, cost reduction, or efficient performance, are allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently a to imply in effect, an agreement to make such payment . . . .

(DAR 15-205.6(c))

39. While DAR 15-205.6 specifically lists various forms of compensation, including stock bonuses and stock options, the DAR principle does not specifically mention dividend payments of any kind.[2]

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[2] Effective 22 March 1983 the DAR specifically disallowed dividend equivalents on phantom stocks (DAR 15-205.6(i)(3). Companies with phantom stock plans attribute contingent shares of stock to employees as if the employees own the stock even though they do not. An employee's account may be increased by the equivalent of dividends issued on the stock and by appreciation in value of the stock. The cost prin-

40. DAR 15-204(d) provides:

> Selected items of cost are treated in 15-205. However, 15-205 does not cover every element of cost and every situation that might arise in a particular case. Failure to treat any item of cost in 15-205 is not intended to imply that it is either allowable or unallowable. With respect to all items, whether or not specifically covered, determination of allowability shall be based on the principles and standards set forth in this Part and, where appropriate, the treatment of similar or related selected items.

41. DAR 15-205.6(j) provides:

> Costs which are unallowable under other paragraphs of this Part 2 of Section XV shall not be allowable under 15-205.6 solely on the basis that they constitute personal compensation.

DECISION

Preliminary Matter

The Government moves to dismiss the appeal because of a faulty certification based upon its view that Mr. Paladino was not the proper official within the corporation to sign the certification. As Senior Vice President and Treasurer, Mr. Paladino was a proper official within the organization to make the certification and we therefore deny the motion to dismiss. *Cf Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir 1989); See *McDonnell Aircraft Company*, ASBCA No. 37346, 89-2 BCA ¶ 21,820.

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ciples applicable to this appeal did not preclude dividend equivalent payments on phantom stocks and thus we do not reach the question of whether the specific costs in question here are similar or related to dividend equivalents paid on phantom stock and thus should be treated in the same manner.

On the Merits

The Government disallowed the payment of dividends on restricted stock of Grumman in large part because dividends are paid out of profits or retained earnings and must be declared by the Board of Directors arguing that dividends are a return of capital to owners of the company, not a form of employee compensation. Further, DCAA found that:

> The dividend payment does not affect the earnings of Grumman Corporation on a consolidated basis. A compensation expense recorded at the segment level is eliminated against an "other income" account at the Corporate home office. Therefore, there is no cost to the company as a whole. If the Government were to allow recovery of the dividends, the contractor would be returning to equity an amount paid out to owners. Dividend payouts are considered transactions between the corporation and its owners, not between the corporation and its employees.

Grumman counters that these payments are not really dividends, because they are treated as ordinary income by the Internal Revenue Service and because the stock on which payments are made are not substantially vested in the employee recipients. Moreover, Grumman says, the accounting treatment at the GAC or segment level is relevant and GAC repays Grumman for the dividends paid to GAC's employees and records these repayments as a compensation cost.

We must first determine if the payment of dividends on restricted stock falls within the broad definition of compensation in 15-205.6. We find that it does. The payments are remuneration in a form which is not precluded, and, since during the period of restriction, the awardee must be an employee, we determine that the remuneration is for services rendered to the contractor during the period

of contract performance. If employment is terminated prior to removal of the restrictions, the employee forfeits the stock and thus relinquishes his or her right to receive dividends. In effect, during the period of restrictions, the right to receive dividends is contingent upon serving the company in the capacity of employee.

We must next determine if this particular type of compensation is allowable or unallowable per the principles. Our analysis must start with the cost principles themselves. First, we observe that 15-205 does not specifically cover dividends on restricted stock. The principles tell us that whenever a particular element of cost or a situation arising thereunder is not covered, we are to determine allowability "based on the principles and standards set forth in [Part XV] and, where appropriate, the treatment of similar or related selected items."

Dividends

Under the Federal Procurement Regulations (FPR) dividends of corporations and profits of partnerships and proprietorships were not allowable costs (FPR 1-15.205.14). The apparent rationale for disallowance of dividends and profits was that they "are not costs, but are, instead, distributions of earnings." Both the DAR, a version of which applies here, and the FAR, which succeeded it, are silent with regard to dividends. Authorities suggest, however, that dividends are not allowable because they are not contract costs. J. P. Bedingfield & L. I. Rosen, *Government Contract Accounting* 10-39 (1985). Rishe states that:

> Since dividend payments are not generally treated as expenses, but as distributions of profit, this cost principle [FPR 1-15.205-14] states the obvious. Although the DAR version of the *Cost Principles* does not contain a similar provision, the implications of FPR 1-15.205-14 apply equally under contracts subject to DAR.

> One problem regarding dividends is the difficulty sometimes encountered in determining whether a certain payment represents an unallowable dividend or distribution of profit, or, instead, is a form of compensation. If the payment is a form of compensation, it might be allowable under the cost principle for compensation costs . . . .

M. Rishe, *Government Contract Costs* 23-45 (1984)

Indeed, on at least two occasions we have held that compensation costs may be incurred even if it [sic] is paid from profits. In *General Dynamics*, ASBCA No. 3653, 58-1 BCA ¶ 1733, the appellant had instituted an incentive compensation plan which paid key employees additional compensation from the gross profits of the corporation. The Board observed:

> The principal objection urged by the Government against the plan is that the payments thereunder are not true compensation but are in fact a sharing of corporate profits and hence for some reason illegal or at least not compensable under the contract. From analysis of the plan we think it is obvious that the payments are compensation to the employees, substantially equivalent to bonuses, the extent of which is measured by the company's surplus gross profits as defined in Section VI of the plan, earlier quoted. If the Government had wished to forbid such a method of compensation it could have done so by contract. But it did not and we can see nothing illegal or objectionable in it per se so long as the payments meet the standard of reasonableness. We find that they do.

58-1 BCA at 6643

We followed *General Dynamics* in *Celesco Industries, Inc.*, ASBCA No. 20569, 77-1 BCA ¶ 12,445. Celesco

sought recovery of incentive bonus payments made to employees. The Government argued therein that these payments represented a distribution of profit and not compensation for services and as such were unallowable, citing *Blount Brothers Construction v. United States*, 180 Ct. Cl. 35 (1967). Appellant in *Celesco* countered with the argument that the payments were not profits but even if they were, they would be allowable, citing *General Dynamics, supra*, and two other cases. This Board was unpersuaded that incentive payments representing the distribution of profits were unallowable, relying upon and quoting from *General Dynamics* as above, and further stating:

> Almost 20 years have passed since our *General Dynamics* decision was issued. The Government has had ample opportunity to modify the cost reimbursement provisions of the Armed Services Procurement Regulation and/or otherwise to assure that contracts are drafted so as to preclude the possibility of situations similar to that present in this appeal from occurring. It has not done so. The Court and Board decisions cited by the Government are not applicable to the situation here. The appellant's employee incentive compensation plan and payments complied with the requirements set forth in ASPR 15-205.6(c) and, absent any limitations in the contract itself, the appellant was entitled to conclude that it would be reimbursed for payments made to its employees pursuant to that plan.

77-1 BCA at 60,283

Just as the contracts in *General Dynamics* and *Celesco* and the applicable cost principles did not preclude the recovery of incentive payments made from profits, the contract here at issue and the applicable cost principles do not preclude the recovery of profits. Since dividends are

paid out of retained earnings and retained earnings are nothing more than a residue of profits the same result must occur. Thus, if the dividend payments to appellant's employees on restricted stock otherwise meet the definition of compensation in DAR 15-205.6, and we have determined that they do, they are not precluded and are thus allowable costs. They are similar to cash or stock bonuses. See *The Boeing Company*, ASBCA No. 24089, 81-1 BCA ¶ 14,864, *aff'd.* on recon., 81-1 BCA ¶ 15,121.

Appellant is therefore entitled to recover the cost of dividends paid on restricted stock to its employees in accordance with the foregoing.

The appeal is granted to the extent stated.

Dated: 24 October 1989

/s/ Richard Shackleford
RICHARD SHACKLEFORD
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I *concur*

/s/ William J. Ruberry
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed
Services Board of Contract
Appeals

I *concur*

/s/ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed
Services Board of Contract
Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 34665, Appeal of Grumman Aerospace Corporation, rendered in conformance with the Board's Charter.

Dated: 3 NOV 1989

/s/ Donald D. Mills
for EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-1217

THE UNITED STATES,

Appellant,

v.

GRUMMAN AEROSPACE CORPORATION,

Appellee.

DECIDED: October 1, 1990

Before MARKEY, *Circuit Judge*, MILLER, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

MARKEY, *Circuit Judge*.

DECISION

The United States appeals from a decision of the Armed Services Board of Contract Appeals (Board), No. 34665, 90-1 BCA ¶ 22,417 (1989), requiring the United States to pay contract "costs" presented in Grumman Aerospace Corporation's (GAC) January 1987 claim. We *VACATE* the Board's decision because it lacked jurisdiction.

OPINION

Under 48 C.F.R. § 33.207(c)(2), a contractor claim must be certified by someone who (i) is "in charge at the contractor's plant or location involved" or (ii) has "overall responsibility for the conduct of the contractor's affairs." GAC's claim was certified only by Mr. Paladino. The Board's holding that he was qualified to certify a claim was not supported by substantial evidence.

Under subsection (i), Mr. Paladino was clearly not "in charge." He reported at least to Nat Busi, who "made the ultimate decision" to present the claim. Mr. Paladino "could not pursue the claim . . . without [Mr. Busi's] approval".

Under subsection (ii), Mr. Paladino's responsibility was not "overall" with respect to "the contractor's affairs". Responsibility limited to financial affairs is not enough. *Ball, Ball & Brosamer, Inc. v. the United States*, 878 F.2d 1426 (Fed. Cir. 1989). Ball's president stated that "Mr. Meek's job entails overall supervision and administration of all cost & claim aspects of the performance and completion of all of the contracts that this firm has at a given time." *Id.* at 1427. In similar language, Mr. Paladino declares "I have overall responsibility for the financial affairs . . . " GAC has not shown greater overall authority for Mr. Paladino than that possessed by Mr. Meek. GAC's reliance on *Triax* is unavailing. In that case, the signer and the president had "equal authority to direct any aspect of Triax's affairs." *Triax Co. v. United States*, 20 Cl. Ct. 507 (1990). As discussed above, Mr. Paladino did not have such overall authority.

APPENDIX D

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JAN 14 1991
FRANCIS X. GINDHART
CLERK

ORDER

Before MARKEY, Circuit Judge, MILLER, Senior Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on January 18, 1991.

FOR THE COURT,
/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

Dated: January 11, 1991

cc: PETER G. BARBER
GENE PERRY BOND
CYRUS E. PHILLIPS
JOHN G. DEGOOYER

US V GRUMMAN AEROSPACE CORP, 90-1217
(BCA—34665)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JAN 25 1991

FRANCIS X. GINDHART
CLERK

ORDER

The order denying the petition for rehearing filed on January 11, 1991, having been entered in error, the order is WITHDRAWN, and the mandate is RECALLED.

Dated: January 25, 1991

FOR THE COURT,

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

cc: PETER G. BARBER
GENE PERRY BOND
CYRUS E. PHILLIPS
JOHN G. DEGOOYER

US V GRUMMAN AEROSPACE CORP, 90-1217
(BCA - 34665)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

N O T I C E

Appeal No. 90-1217

The United States,

Appellant,

v.

Grumman Aerospace Corporation,

Appellee.

On January 30, 1991, one or more copies of an opinion in this appeal were inadvertently released to the public.

The opinion is of no effect. It has not been entered on the docket, and no revised judgment has been filed. The petition for rehearing and suggestion for rehearing in banc remain pending.

February 20, 1991